Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC., *et al.*,
Petitioners,

v.

THE CITY OF LONG BRANCH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether permitting secular assembly land uses such as "assembly halls" while prohibiting religious assembly land uses such as "churches" in the same zoning district violates the First Amendment of the United States Constitution.

Whether permitting secular assembly land uses such as "assembly halls" while prohibiting religious assembly land uses such as "churches" in the same zoning district violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*.

LIST OF PARTIES

The parties to the proceedings below were The Lighthouse Institute for Evangelism, Inc., d/b/a the Lighthouse Mission; Reverend Kevin Brown; United States of America; The City of Long Branch, N.J.; BCIC Funding Corp.; Breen Capital Services, Inc.; Abrams Gratta & Falvo, P.C.; Peter S. Falvo, Esq.; Eugene M. Lavergne, Esq., and John Does A-Z.

The Lighthouse Institute for Evangelism, Inc. has neither a parent company nor any nonwholly owned subsidiaries.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Apx. 1a-12a, is reported at 100 Fed. Appx. 70 (3d Cir. 2004). The opinion of the District Court, Apx. 15a-53a, is unreported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was entered on May 28, 2004.

Petitioners filed for panel rehearing and rehearing *en banc* on July 12, 2004. The court denied the petition on July 26, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court's jurisdiction was based on 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, provides:

§ 2000cc. Protection of land use as religious exercise

. . . .

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

. . . .

STATEMENT OF THE CASE

Petitioners seek review of a panel decision of the Court of Appeals for the Third Circuit. That decision affirmed the district court's decision denying Petitioners injunctive relief that would permit it to assemble for religious purposes (in a zoning district that prohibited such assembly) on an equal basis as it would be permitted to assemble for secular purposes. The Third Circuit's holding that such discrimination does not violate the First Amendment of the United States Constitution and the federal Religious Land Use and Institutionalized Persons Act is in direct conflict with a decision of the Eleventh Circuit Court of Appeals, *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (2004), which is also currently before this Court on a petition for certiorari, No. 04-469.

1. *Factual Background*

The facts presented in this Petition are undisputed and straightforward: Based on the terms of a municipality's zoning code, Petitioner church was prohibited from using its property as a religious assembly use, although it could use the property for secular assembly purposes, namely, as an "assembly hall."

Petitioner Lighthouse Mission (the "Mission" or the "Church") is a Christian church that along with Petitioner Reverend Kevin Brown has sought since the early 1990s to serve the poor and disadvantaged in downtown Long Branch, New Jersey. 100 Fed. Appx. 70, 73; Apx. 3a. From 1992 to 1994, Long Branch permitted the Mission to carry out its religious activities at a rented location at 159 Broadway, Long Branch, New Jersey. *Id.* On November 8, 1994, the Mission purchased the property known as 162 Broadway, Long Branch (the "Property") to continue this religious activity. *Id.*

The Property is located in the City's C-1 Commercial District. *Id.* Although a number of assembly uses are permitted in the C-1 District, churches are not permitted either by right or by Conditional Use Permit. 100 Fed. Appx. at 74; Apx. 3a; D.C. Op. at 4-5; Apx. 18a-20a. In particular, Long Branch permits the following public assembly land uses, among others, as of right in the C-1 District:

- "Assembly hall, bowling alley and motion-picture theater";
- "Health spa/gym";
- "Educational services and colleges";
- "Municipal buildings, parks and playgrounds";
- "Restaurants and eating and drinking places."

Id.[1] Churches are not included as a permitted or conditional use. *Id.*

2. The District Court Proceedings

The Lighthouse Institute for Evangelism and Reverend Brown brought, *inter alia*, a § 1983 action against the City of Long Branch under the First Amendment and the Religious Land Use and Institutionalized Persons Act, seeking damages and injunctive relief. For purposes relevant to this petition, the Church moved for preliminary injunction, arguing that differential treatment between secular and religious assembly land uses violated these constitutional and

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[1]Although not strictly relevant to Petitioners' facial challenge, various secular assembly uses do, in fact, exist in the City's C-1 District, including a "Portuguese Club," the "Spanish Fraternity of Monmouth County," the "Brookdale Learning Center," and the "Seashore Day Camp." 100 Fed. Appx. at 76; Apx. 10a-11a. These existing uses serve to underscore the discriminatory nature of the City's Ordinance.

statutory provisions. 100 Fed. Appx. at 74, Apx. 2a.

On April 7, 2003, the District Court denied Plaintiffs' motion for preliminary injunction.[2] D.C. Op. at 35; Apx. 52a-53a. The court's reasoning was based on an unsupported assumption that the permitted use "assembly halls" might include only "commercial" assembly halls. *Id.* at 31; Apx. 47a-48a. The court cited no evidence in support of this belief. *Id.* The court denied Plaintiffs' motion for summary judgment "without further evidence as to the type of assemblies Long Branch allows," *id.*, and then inexplicably held that "[f]or the reasons discussed . . . Plaintiffs will not likely be able to prove [for purposes of the preliminary injunction standard], even after further factual development, that the Ordinance inherently violates their rights under the RLUIPA, First Amendment Rights, or Fourteenth Amendment equal protection rights." *Id.* at 32; Apx. 50a. The court did not discuss the distinction between the legal standards for summary judgment and preliminary injunction. *Id.*

On May 6, 2003, Petitioner filed a timely notice of appeal from the April 7 Order.

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[2]The District Court also denied Plaintiffs' motion for summary judgment based on its Free Exercise claim; dismissed several counts in so far as Long Branch's zoning laws were illegally applied to Plaintiffs without prejudice; denied Long Branch's motion for summary judgment as to Plaintiffs' facial challenge to Long Branch's zoning ordinances; and issued unrelated orders regarding separate Defendants. Order at 1-2; Apx. 55a-56a.

3. The Court of Appeals' Opinion.

On May 28, 2003, a panel[3] of the Third Circuit Court of Appeals affirmed the District Court judgment in an unpublished and nonprecedential opinion. 100 Fed. Appx. 70; Apx. 1a-12a. The court abandoned the district court's reasoning and did not affirm the judgment based on an unsupported assumption that only "commercial" assembly halls were permitted in Long Branch's C-1 District. Instead, it affirmed the judgment based on an equally unsupported assumption that Petitioner church could have applied as an "assembly hall," and not a "church," to use its property, irrespective of the fact that it was, in fact, a "church," and that a "church" use is specifically defined and provided for in the Long Branch Zoning Ordinance.

Although the church limited its appeal[4] to the facial claims of discrimination by the Ordinance against religious assembly uses under the First and Fourteenth Amendments and RLUIPA, the panel devoted the bulk of its opinion to unrelated, unappealed claims. It devoted only one paragraph to Petitioners' claim that treating "assembly halls" more favorably than "churches" violated RLUIPA's Equal Terms provision. 100 Fed. Appx. at 77; Apx. 10a-11a. This holding, in its entirety, reads:

> Similar weaknesses also plagued the Mission's claim under part (b)(1), the Equal Terms

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[3]The panel was composed of Circuit Judges Fuentes and Smith and Judge Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

[4] 100 Fed. Appx. at 76 n.5; Apx. 10a ("The Mission emphasizes its claim under part (b)(1), the 'Equal Terms' provision, in this appeal . . . .").

> provision. Because the Mission did not show that it would be prohibited from operating in the district if it applied under the "assembly hall" category, it could not show that the Ordinance, on its face, treated it on less than equal terms than a nonreligious assembly. Indeed, as noted above, the Mission also failed to produce evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made under this provision. *See Congregation Kol Ami v. Abington Township,* 309 F.3d 120, 125 (3d Cir. 2002).

100 Fed. Appx. at 77; Apx. 10a-11a. The panel reasoned thus despite the fact, as it acknowledged, "[t]he Ordinance does not identify 'church' as a permitted use" in the C-1 District, and despite the fact that Petitioners' "application to proceed as a church was denied." *Id.* at 74; Apx. 5a. In other words, the court rejected the Church's Equal Terms claim because it had not, additionally, applied for a land use permit as a land use category it could not apply for.

The panel devoted one additional paragraph to Petitioners' claims under the Free Exercise Clause. *Id.* In conclusory fashion, it held that the Ordinance, despite its facial terms permitting "assembly halls" and prohibiting "churches," was "neutral and [] generally applicable," and therefore the Free Exercise Clause was not implicated. *Id.*

Judge Gibson concurred separately, correctly opining that

> The term "Assembly Hall" seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church's application therefore demonstrates approval of secular assemblies and rejection of religious assemblies. Nor

> is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church's mission, to "serve the poor and disadvantaged in downtown," can only be accomplished downtown.

100 Fed. Appx. at 78; Apx. 12a. However, regardless of this conclusion, he inexplicably concurred in the result and the judgment. *Id.*

Petitioner filed for panel rehearing and rehearing *en banc* on July 12, 2004. The court denied the petition on July 26, 2004.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts with the Decisions of this Court and the Decision of the Eleventh Circuit.

RLUIPA. The Religious Land Use and Institutionalized Persons Act's ("RLUIPA") "Equal Terms" provision states that

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1) (emphasis added). Long Branch's zoning ordinance violates this provision on its face. It is beyond cavil that permitting "assembly halls" while prohibiting "churches" in a zoning district is impermissible under RLUIPA. By the plain meaning of the term, an "assembly hall" is a "nonreligious assembly." A church is a "religious assembly."

In applying this provision, the Third Circuit's decision, *supra*, conflicts with the decision of the Eleventh Circuit in a nearly identical case regarding categorical exclusions of religious land use.[5] In *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *petition for cert. filed*, No. 04-469. (Oct. 1, 2004),[6] the Eleventh Circuit Court of Appeals followed the letter and spirit of RLUIPA's Equal Terms provision, holding that a town could not treat religious assembly land uses differently and worse than secular assembly land uses. In that case, the most

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[5]Additionally, the Third Circuit's decision is internally inconsistent with its prior decisions, holding in other contexts that categorical exclusions of religious activity—while similar secular activity is permitted—violates the Free Exercise Clause. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.) (police department policy that allowed medical exemptions from no-beard rule but no exemptions for religious or any other reason violated Free Exercise Clause), *cert. denied*, 528 U.S. 817 (1999); and *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (city's prohibition of religious materials placed on utility poles violated Free Exercise Clause when other secular materials were permitted), *cert. denied*, 539 U.S. 942 (2003). These holdings are faithful applications of this Court's Free Exercise jurisprudence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding prohibition on religious animal slaughter unconstitutional while equivalent, secular slaughter remained permissible).

[6]*Midrash* was provided to the Third Circuit panel as supplemental authority on April 23, 2004, but the panel's decision did not cite it.

analogous permitted secular use was "private club." *Id.* The Eleventh Circuit did not use the Third Circuit's disjointed logic that a place of worship must first apply as the other permitted, secular use (and presumably be rejected because, as all parties acknowledge, Petitioner is a "church" and not an "assembly hall") before it can state a valid claim under the Equal Terms provision.

Rather, the Eleventh Circuit applied RLUIPA's Equal Terms provision[7] in a manner consistent with its text:

> [T]he text of SZO § 90-152, which permits private clubs and other secular assemblies, excludes religious assemblies from Surfside's business district. Because we have concluded that private clubs, churches and synagogues fall under the umbrella of "assembly or institution" as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.

366 F.3d at 1231. Similarly, here there can be no doubt that an "assembly hall" is an "assembly or institution" under RLUIPA. Since Long Branch's Ordinance permits assembly halls and prohibits churches, under *Midrash*, this "differential treatment" constitutes a violation of § (b)(1) of RLUIPA.

The Third Circuit's holding to the contrary—that the Church (or "churches," generally) was not treated worse than the permitted use of "Assembly Halls" because the Church did not first apply as an assembly hall—places it in direct conflict with *Midrash,* which did not require the religious institution at issue in that case to first apply as a "private

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[7]The Eleventh Circuit noted that "RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent." *Id.* at 1332.

club."[8]

There is no such requirement under RLUIPA. Instead, as the *Midrash* court held, "[f]inding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently." *Id.* The court noted that private clubs were permitted, and religious assemblies were "exclude[d]." *Id.* It then concluded that since "private clubs,

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[8]This question has confounded the Seventh Circuit as well. In *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), Judge Posner dissented from this panel decision addressing—in an Equal Protection context—the issue of differential treatment of religious and secular assembly land uses:

> [T]he predecessor ordinance allowed fraternal lodges and other clubs, community centers, and other meeting places to locate in the commercial zone without obtaining a permit. . . . The only difference between them and churches is that they are secular. There is no difference so far as the use of land is concerned. . . . A church is no more or less suitable for the residential zone than a fraternal lodge and a fraternal lodge no more or less suitable for the commercial zone than a church. The old ordinance discriminated arbitrarily in favor of churches in the residential zone and against them in the commercial zone, thus distorting religious competition in favor of existing and against new churches.

Id. at 773. The panel majority ignored these facts. *Id.* at 766-67. The varied decisions of the Third, Seventh, and Eleventh Circuits demonstrate that guidance is sorely needed in this area of law.

churches and synagogues fall under the umbrella of 'assembly or institution' as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA." *Id.* It cannot be disputed that, on its face, "Assembly Halls" in Long Branch likewise "fall under the umbrella of 'assembly or institution,'" and therefore RLUIPA is violated. The two decisions cannot be reconciled.

Free Exercise Clause. There is also a clear conflict between the Third and Eleventh Circuits on the question of whether the Free Exercise Clause likewise prevents municipalities from treating religious and secular assembly land uses differently. The Third Circuit held that such an ordinance was "neutral and generally applicable," and therefore permissible under this Court's decision in *Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990):

> With regard to its facial Free Exercise claim, the Ordinance is properly considered as a neutral law of general applicability because churches are only one of numerous uses which are not specifically permitted uses and the purpose of the Ordinance is not aimed at speech, but rather at promoting the revitalization of the City's downtown area.

100 Fed. Appx. at 75, Apx. 7a. This non sequitur incorrectly focuses on the justification—the governmental interest asserted—for the discrimination, and not the character of the discrimination itself. To the Third Circuit, a law is neutral and generally applicable if the purported reasons for discriminating are neutral and generally applicable, even if the text of that law is not.[9]

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[9]As noted above, the justification itself fails, since "assembly halls"—a use as conducive to "revitalization of

The *Midrash* court, faithful to this Court's holding in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face."), examined the facial distinction between the treatment of religious and nonreligious assembly land uses on the face of the ordinance:

> RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent. . . . A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly.

Midrash, 366 F.3d at 1232 (emphasis added). *See also id.* (holding that an ordinance that treats places of worship worse than private clubs "reveals that Surfside improperly targeted religious assemblies and violated Free Exercise requirements of neutrality and general applicability."). In fact, the Eleventh Circuit even applied the Third Circuit's own *Fraternal Order of Police v. City of Newark*, *supra*, decision to *Midrash*, a decision that the panel below ignored. *Id.* at 1235.

Had the panel reached the merits of the Church's RLUIPA and Free Exercise claims, it is clear that a likelihood of success would have been demonstrated. Churches are treated worse than assembly halls and other permitted uses in the zoning district, as Judge Gibson made

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the City's downtown area" as churches—are permitted as well.

clear in his concurrence:

> The term "Assembly Hall" seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church's application therefore demonstrates approval of secular assemblies and rejection of religious assemblies. Nor is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church's mission, to "serve the poor and disadvantaged in downtown," can only be accomplished downtown.

100 Fed. Appx. at 78; Apx. 12a (Gibson, J., concurring). There appears to be no basis for the panel's decision that Long Branch does not violate RLUIPA's Equal Terms provision by treating churches worse than assembly halls—in fact, the panel never even addresses it, having chosen rather to decide that the Church should have applied as a hypothetical (and non-existent) church "assembly hall." *Id.* at 74-75; Apx. 6a-7a.

This case in its current posture is an appropriate vehicle to resolve the conflict of the circuits. The Court of Appeals was straightforward in its affirmance of the district court's rejection of Petitioners' discrimination claims, holding that a municipality could discriminate against religious activity while permitting equivalent nonreligious activity, as long as its reasons for doing so are licit. The relevant facts are not in dispute, the church continues to suffer desperately from a lack of a religious facility, and the conflict between the circuits is clear.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,
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October 22, 2004

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Filed May 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2343

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a the Lighthouse Mission; KEVIN BROWN, Reverend, Appellants, UNITED STATES OF AMERICA, Intervenor-Plaintiff in D.C.,

v.

THE CITY OF LONG BRANCH; BCIC FUNDING CORP; BREEN CAPITAL SERVICES, INC.; ABRAMS GRATTA & FALVO, P.C.; PETER S. FALVO, ESQ.; EUGENE M. LAVERGNE, ESQ.; JOHN DOES A-Z.

Appeal from the United States District Court
For the District of New Jersey
District Judge: The Honorable William H. Walls
(Civil No. 00- 03366)

Argued March 22, 2004
Before FUENTES, SMITH and GIBSON*, Circuit Judges

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* The Honorable John R. Gibson, Senior Circuit Judge for the United States Court of Appeals for Eighth Circuit, sitting by designation.

OPINION OF THE COURT

SMITH, Circuit Judge:

Appellants, the Lighthouse Institute for Evangelism, Inc. and Reverend Kevin Brown (collectively, "the Mission"), appeal the District Court's denial of its Motion for Preliminary Injunction. The Mission sued the City of Long Branch, New Jersey ("the City") under 42 U.S.C. §§ 1983, 3601 and 2000cc et seq., challenging the facial and as applied legality of Long Branch's zoning ordinance ("the Ordinance") under the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq. Both parties moved for summary judgment and the Mission also sought a preliminary injunction. At the time these cross-motions were filed, discovery had been stayed since its early stages. The District Court ruled on the motions without conducting an evidentiary hearing,[1] dismissing all of the Mission's as applied challenges for either lack of exhaustion or ripeness, and denying the Mission's Motion for Preliminary Injunction.[2] In doing so, it noted that "Plaintiffs will not likely be able to prove, even after further factual

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[1] The Mission has not argued that the absence of such a hearing was improper, nor is there any indication in the record that either party requested a hearing on this motion.

[2] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a) and 1367. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which permits circuit courts to review an interlocutory decision of the District Court denying a motion for a preliminary injunction. The Mission challenges only the denial of the preliminary injunction as to its facial claims in this appeal.

development, that the Ordinance inherently violates their rights under RLUIPA." Because we agree that the Mission did not satisfy its burden of demonstrating a likelihood of success on the merits, we will affirm the District Court's denial of the Mission's Motion for Preliminary Injunction.

This Court held in Sims v. Greene, 161 F.2d 87, 89 (3d Cir.1947), that the failure to hold an evidentiary hearing to allow a party to defend against the grant of a preliminary injunction may be grounds for vacating such an injunction. There is no caselaw indicating that the contrary is also true, i.e., that failure to hold a hearing to allow a party to present evidence in support of its motion for injunction may be cause for vacatur. In the absence of argument from the Mission on this point, we need not address it.

I.

Because we write only for the parties, we set forth only a brief recitation of the facts. The Mission is a Christian church which "seeks to serve the poor and disadvantaged in downtown Long Branch, New Jersey." From 1992 to 1994, the Mission carried out its activities from a rented location at 159 Broadway in the City of Long Branch. On November 8, 1994, the Mission purchased 162 Broadway, a property across the street from its rented property. Both properties are located in Long Branch's C-1 Commercial District. The Mission submitted a Zoning Permit Application to the City which sought permission to operate on the purchased property "as a church" and also requested that all applicable fees "be waived as a nonprofit church." The City denied that application because the proposed use was "not a permitted use in the Zone." The Letter of Denial also noted that the proposed use "would require prior

approvals from the Zoning Board of Adjustment, including but not limited to, a use variance, site plan approval, & parking variance." In response to the Mission's request that fees be waived, the Letter advised that "any waiver of fees ... must come from the City Council." The Mission did not appeal this decision, nor did it seek a variance from the City. Thereafter, the Mission commenced this civil action and moved for a Preliminary Injunction. The District Court denied the request for injunctive relief.

II.

We review the denial of a preliminary injunction for abuse of discretion, but any "determination prerequisite to the issuance of an injunction" is reviewed according to the standard applicable to that determination. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 156 (3d Cir.2002) (internal citations omitted). This Court exercises plenary review over the District Court's conclusions of law and its application of the law to the facts. Id. Although an appellate court generally will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error, in the context of a First Amendment claim, this Court has a "constitutional duty to conduct an independent examination of the record as a whole, ... and cannot defer to the Court's factual findings unless they concern witnesses' credibility." Id. at 156-57 (internal quotations and citations omitted).

III.

Four factors determine whether a District Court will issue a preliminary injunction. The first two threshold showings which the movant must demonstrate are: (1) that he is reasonably likely to prevail eventually in the litigation, and (2) that he is likely to suffer irreparable injury without relief. Tenafly, 309 F.3d at 157. If he is

successful in satisfying these first two factors, then the court will consider, to the extent relevant, (3) whether an injunction would harm the party opposing the motion more than the movant, and (4) whether granting the relief would serve the public interest. Id. The District Court held, and we agree, that the Mission failed to make the first required showing, i.e., that it had a reasonable likelihood of success on the merits.

The City's Ordinance Number 20-6.13 ("the Ordinance"), identifies the permitted uses in the C-1 Central Commercial District, which include, inter alia: "Assembly hall, bowling alley and motion-picture theater, provided that it is carried on within a building." Ord. No. 20-6.13(A)(3), as amended in Ordinance § 345-30. The Ordinance does not identify "church" as a permitted use. Because its application to proceed as a church was denied, the Mission argues that "Long Branch does not permit churches as 'assembly halls.' "Thus, in the Mission's view, only secular assemblies may operate in the district. The record on appeal does not support this argument, however. Because the Mission listed "church" in its application as the proposed use for the property, it is not clear whether the City would permit the Mission to operate under the assembly hall category, had it listed that use in its application. The Ordinance does not define "assembly hall." As the Mission points out in its brief, however, the American Planning Association's Glossary of Zoning, Development and Planning Terms includes religious assemblies in each of its suggested definitions for the term "assembly hall." See Michael Davidson & Fay Dolnick (eds.), A Glossary of Zoning, Development, and Planning Terms, American Planning Association Planning Advisory

Service Report Nos. 491/492 at 39-40.[3] Although a number of religious uses are identified in these definitions of assembly hall, we note that the term "church" may in fact encompass a range of activities which would extend beyond the concept of an "assembly hall." See, e.g., Grace United Methodist Church v. City of Cheyenne, 235 F.Supp.2d 1186, 1196 (D.Wyo.2002). Therefore, denial of the Mission's application as a "church" does not establish whether the Mission's application would have been approved as an "assembly hall." It is significant that the sparse record before the District Court contained no evidence establishing that "Long Branch only allows assemblies of the secular sort," as the Mission contends in this appeal. The record before us reveals only the denial of

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[3] The American Planning Association provides sample definitions from various zoning statutes around the country in order to define the terms listed in its glossary. In each of the definitions provided for "assembly hall," religious uses are included. The glossary provides, in relevant part:

assembly hall ... A building or portion of a building in which facilities are provided for ... religious ... purposes....

A meeting place at which the public or membership are assembled regularly or occasionally, including, but not limited to ... churches ... and similar places of assembly....

A structure for groups of people to gather for an event or regularly scheduled program. Places of public assembly include, but are not limited to ... religious institutions ... and similar facilities....

A building or a portion of a building used for gathering for such purposes as ... worship, ... church, or chapel[.] ...

the Mission's application which made no attempt to associate its proposed use with the assembly hall category. Moreover, as the Mission points out, there are a number of churches currently located within the C-1 district. The underlying action continues before the District Court on the facial claims, but at the early stage at which this motion was considered, the Mission simply did not make the kind of factual showing necessary to establish a likelihood of success on the merits.

IV.

With regard to its facial Free Exercise claim, the Ordinance is properly considered as a neutral law of general applicability because churches are only one of numerous uses which are not specifically permitted uses and the purpose of the Ordinance is not aimed at speech, but rather at promoting the revitalization of the City's downtown area. See Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); see also Tenafly, 309 F.3d at 165.[4] Other than the conclusory allegations in its complaint, as reiterated in the declaration of Kevin Brown, the Mission did not proffer

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[4] See also Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir.1999) ("Smith applies to the free exercise challenge to the zoning decision in this case."); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir.1991) ("Absent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability"); Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir.1990) ("Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions").

any evidence to show that the Ordinance was either not neutral or not generally applicable. Under Smith, a Free Exercise claim alone cannot bar application of a neutral law of general applicability. 494 U.S. at 881, 110 S.Ct. 1595. For the reasons described below, the Mission failed to show that it had a likelihood of success on any hybrid claim.

With respect to the Mission's claim that the Ordinance violated its rights to Free Speech and Assembly, we undertake rational basis review to determine whether the legislation is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective." Belle Terre v. Boraas, 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The Ordinance in this case is content-neutral because it is not aimed at prohibiting religious speech, but is rather a zoning ordinance which identifies certain uses which advance the City's goal of promoting commercial development in its downtown district. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Like the ordinance examined in Renton, the omission of churches as a permitted use in the district resulted not from the content of the speech involved, but from the secondary effect (or lack thereof) of their presence, i.e., churches were not identified as promoting commerce. Further, the Mission has not shown that there were no other channels for communication; rather, churches are specifically permitted in other districts and the Mission had been allowed to operate as a church in its rented property in the C-1 district. Accordingly, we agree with the District Court that the Mission did not show that it was likely to succeed on its Free Speech claim.

On the Mission's freedom of association claim, where the rights concerned are protected by the First Amendment and "abridgement of such rights, even though unintended,

may inevitably follow from varied forms of governmental action," the regulation will only be upheld where the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Even under this standard, however, the Mission did not demonstrate a likelihood of success on the merits. Tellingly, the Mission had not been prohibited or restricted at its rented location. As discussed above, the Mission presented no evidence that its application would have been rejected had it applied as an assembly. It is undisputed that the Mission could have operated by right in other districts in the City.

Finally, as to its Equal Protection claim, the Mission did not establish, under Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), that it was not treated like secular assemblies because it did not demonstrate that it would be prohibited from operating in the C-1 district under the assembly hall category. 473 U.S. at 439, 105 S.Ct. 3249 ("all persons similarly situated should be treated alike"). Additionally, due to the dearth of evidence in the record before the District Court on the Mission's Motion for Preliminary Injunction, the Mission also failed to show that the secular assemblies it identified as having been permitted in the district (i.e., the Portuguese Club, the Spanish Fraternity of Monmouth County, the Brookdale Learning Center, the Seashore Day Camp, the New Jersey Repertory Company Theater and the Monmouth Medical Center Free Clinic) were similarly situated.

V.

The Mission contends that the City violated subsections (a) and (b) of RLUIPA, 42 U.S.C. § 2000cc-2.[5] The Mission did not establish a likelihood of success on its "substantial burdens" RLUIPA claim under part (a), because it had operated for years at the rented location in the district and thus its opportunity for religious exercise was not curtailed by the Ordinance. See Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago, 342 F.3d 752, 761 (7th Cir.2003) ("substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable"). Further, it is undisputed that the Mission could have operated as a church by right in other districts in the City.

Similar weaknesses also plagued the Mission's claim under part (b)(1), the Equal Terms provision. Because the Mission did not show that it would be prohibited from operating in the district if it applied under the "assembly hall" category, it could not show that the Ordinance, on its face, treated it on less than equal terms than a nonreligious assembly. Indeed, as noted above, the Mission also failed to produce evidence to support its contention that the secular

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[5] The Mission emphasizes its claim under part (b)(1), the "Equal Terms" provision, in this appeal but does not abandon its claims under the other parts of the statute. We will, therefore, address all of the Mission's facial claims under RLUIPA. In doing so, we note, as did the District Court, that the caselaw interpreting this relatively new statute in this and other Circuits is scarce. Because of the state of the record before the District Court in this case, we do not undertake in this opinion to clarify the state of the law in this area.

assemblies it identified were actually similarly situated such that a meaningful comparison could be made under this provision. See Congregation Kol Ami v. Abington Township, 309 F.3d 120, 125 (3d Cir.2002).

The Mission did not show a likelihood of success on its "Nondiscrimination" claim under part (b)(2) because there is no indication on the face of the statute that any distinction is drawn between religious and secular assembly halls (or in any other category, for that matter) and the Mission did not produce any other evidence to suggest that the City had interpreted it as such. In fact, the very definition for assembly hall that the Mission provided suggests that, absent evidence to the contrary, the Ordinance is probably neutral with respect to the inclusion of religious organizations and uses within its assembly hall category.

Finally, the Mission also failed to demonstrate that it had a likelihood of success on its claim that the City violated the "Exclusion and limits" provision of RLUIPA under part (b)(3), by either totally excluding religious assemblies from the jurisdiction or unreasonably limiting religious assemblies, institutions or structures within a jurisdiction. It is undisputed that the Mission was not totally excluded from the jurisdiction because it could have operated in other districts in the City by right. The record contained no indication that the City would have denied the Mission's application to operate within the C-1 district had it applied under the category of "assembly hall." As the Mission did not show that it was limited as a religious assembly in the C-1 district, there was therefore no need for the District Court to assess whether the alleged limitation or exclusion was "unreasonable."

VI.

On the basis of the record which was available to the District Court when it decided this Motion for Preliminary Injunction, there simply was no basis for the District Court to have concluded that the Mission had a likelihood of success on either of its facial challenges under the First Amendment or RLUIPA. The Ordinance does not exclude religious assemblies on its face and the Mission did not produce any evidence to show that the City's policy is such that it interprets the Ordinance to do so. Therefore, we will affirm the decision of the District Court.

JOHN R. GIBSON, Circuit Judge, concurring in the result and in the judgment:

I concur in the judgment, which denies the motion for a preliminary injunction and leaves open the possibility of further consideration of the issues on the motion for permanent injunction.

I have, however, some reservations about language in the court's opinion and am of the thought that these issues should be ventilated in the hearing still to come. The term "Assembly Hall" seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church's application therefore demonstrates approval of secular assemblies and rejection of religious assemblies. Nor is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church's mission, to "serve the poor and disadvantaged in downtown," can only be accomplished downtown. I concur with the understanding that these issues should be open for further consideration at the permanent injunction stage, rather than being barred by anything in the court's decision today.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2343

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a THE LIGHTHOUSE MISSION; KEVIN BROWN, REVEREND,
Appellants,

UNITED STATES OF AMERICA,
Intervenor-Plaintiff in D.C.,

v.

THE CITY OF LONG BRANCH; BCIC FUNDING CORP; BREEN CAPITAL SERVICES, INC.; ABRAMS GRATTA & FALVO, P.C.; PETER S. FALVO, ESQ.; EUGENE M. LAVERGNE, ESQ.; JOHN DOES A-Z.

Appeal from the United States District Court
For the District of New Jersey
District Judge: The Honorable William H. Walls
(Civil No. 00- 03366)

Argued March 22, 2004
Before FUENTES, SMITH and GIBSON, *Circuit Judges*[*]

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[*] The Honorable John R. Gibson, Senior Circuit Judge for the United States Court of Appeals for Eighth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 22, 2004. On consideration thereof, it is now ORDERED and ADJUDGED that the judgment of the District Court entered on April 7, 2003, be and the same hereby is AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant and in favor of Appellee.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: May 28, 2004

Costs taxed against Appellant and in favor of Appellee as follows:

Appellee's Brief:	$126.00
Supplemental Brief:	$101.40
Covers:	$40.00
TOTAL:	$267.40

Certified as a true copy and re-issued in lieu of a formal mandate on August 3, 2004

Teste: /s/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit.

Filed April 7, 2004

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN	:
Plaintiffs,	:
v.	:
THE CITY OF LONG BRANCH, BCIC FUNDING CORP., BREEN CAPITAL SERVICES, INC., ABRAMS GATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LAVERGNE, ESQ., and JOHN DOES A-Z	:
Defendants.	:

OPINION
Civil Action NO. 00-3366

Walls, District Judge

This case is before the Court on a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(c) by Plaintiffs The Lighthouse Institute for Evangelism, Inc. d/b/a The Lighthouse Mission and Reverend Kevin Brown on Count III of Plaintiffs' Amended Complaint alleging Defendant Long Branch's Zoning Ordinance 20-6.13, prohibiting Plaintiff from using their property for religious forms of assembly, is unconstitutional. Also currently before the Court are Plaintiffs' motion for preliminary injunctive relief, and Defendant BCIC's motion for summary judgment. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367.

FACTS

The Court incorporates by reference the factual background described in its opinion of this date on the motion for summary judgment of Defendant Long Branch.

Plaintiffs now move for judgment on Count III of their amended complaint. Defendant Long Branch oppose Plaintiffs' motion, asserting that Plaintiffs' claim is not ripe for adjudication, or in the alternative, that Long Branch's Zoning Ordinance 20-6.13 is not unconstitutional.

Plaintiffs also move for a preliminary injunction against defendants Long Branch and BCIC. Both defendants oppose the motion for preliminary injunction, and BCIC cross-moves for summary judgment.

ANALYSIS

I. Standard of Law Applied to Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Kreschollek v. Southern Stevedoring Co., 223 F.2d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. See Boyle v. Allegheny Pennsylvania, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The Supreme Court has stated that in evaluating a defendant's motion for summary judgment:

> [t]he judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence on support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict . . . .

Anderson, 477 U.S. at 252. A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. See id.

To survive a motion for summary judgment, a plaintiff must present more than a mere scintilla of evidence in his favor. Id. He "cannot simply reallege factually unsupported allegations contained in his pleadings." Anderson, 477 U.S. at 249; see also Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994). Only evidence that would be admissible at trial may be used to test a summary judgment motion; evidence with a deficient foundation must be excluded from consideration. See Blackburn v. United Parcel Service, Inc., 179 F.3d 81 (3d Cir. 1999).

II. Plaintiffs' Motion for Summary Judgment on Count III of their Amended Complaint alleging Defendant Long Branch's Zoning Ordinance 20-6.13 is Facially Over Broad and Unconstitutional

Long Branch Zoning Ordinance 20-6.13, as amended to Ordinance 345-30 provides, in pertinent part:

C-1 Central Commercial District

A. Permitted uses. Permitted uses shall be as follows:

(1) Retail trade stores, as follows:
(a) New or previously unused general merchandise.
(b) Food.

(c) New automobile showrooms of authorized automobile dealerships, and new and used car lots only in conjunction therewith;
automobile and marine accessories; new boat showrooms of authorized boat dealerships; and new and used boat lots or used car lots in conjunction therewith.

(d) Apparel and accessories.

(e) New or previously unused furniture, home furnishing and equipment.

(f) Restaurants and eating and drinking places, but not drive-in restaurants.

(g) Variety stores, drug stores, florists, or other retail trade stores, but not including fuel.

(h) Delicatessens.

(i) Antique, used book, memorabilia and collectible dealers.

(j) Tattoo parlors, except that no tattoo parlor may be located within 1,000 feet of another tattoo parlor.

(2) Service uses, as follows:

(a) Finance, insurance, real estate, legal, personnel and business consulting services.

(b) Governmental services.

(c) Educational services and colleges, but excluding primary and secondary.

(d) Publication of newspapers and periodicals.

(e) Professional office/services.

(3) Assembly hall, bowling alley and motion-picture theater, provided that it is carried on within the building.

(4) Municipal buildings, parks and playgrounds.

(5) Temporary buildings for uses incidental to construction work, provided that such buildings are removed upon completion or abandonment of the construction work.

(6) High Technology Light Industrial.

(7) Health spa/gym.

(8) Barbershop/beauty salon/tanning salon.

. . .

D. Uses requiring a conditional use permit. These uses shall be subject to Article VII, Conditional Uses:

(1) Public utilities.

(2) Motor vehicle service stations.

(3) Senior citizen housing.

(4) Secondhand stores.

. . .

(Def. Long Branch's Brief, Exh. B (Long Branch Ordinance 20-6.13, as amended to Ordinance 345-30)).

As noted, Plaintiffs' property at 162 Broadway is located in the C-1 Commercial District. A church facility or other religious organization is not a permitted use in that zone. Plaintiffs challenge the regulations, asserting that Long Branch Ordinance 20-6.13 is facially over broad and unconstitutional on several grounds: (1) the Ordinance violates Plaintiffs' rights to the free exercise of religion under the First Amendment; (2) the Ordinance violates Plaintiffs' rights to freedom of speech under the First Amendment; (3) the Ordinance violates Plaintiffs' rights to freedom of association under the First Amendment; (4) the Ordinance violates Plaintiffs' rights to equal protection under the Fourteenth Amendment; and (5) the Ordinance violates Plaintiffs' rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq. Defendant argues Plaintiffs' challenge as to the constitutionality of the Ordinance is not ripe for review by this Court. However, the Court has already determined on Defendants' motion for summary judgment, that all claims alleging that the Ordinance itself, rather than as applied, is unconstitutional are ripe. See Opinion and Order dated April 4, 2003. In the alternative, Defendant asserts that the Ordinance does not violate Plaintiffs' constitutional rights, or at the very least, further evidence is required for the Court to make such a finding, and therefore, Plaintiffs' motion for summary judgment should be denied.

A. Long Branch Ordinance 20-6.13 and Plaintiffs' First Amendment Rights to Free Exercise of Religion

The Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Relying on Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981), Plaintiffs assert that when a zoning ordinance encroaches upon a protected liberty, "it must be narrowly drawn and further a sufficiently substantial government interest." Plaintiffs contend that Zoning Ordinance 20-6.13 does not meet the requirements of Schad, and therefore, violates Plaintiffs' rights under the Free Exercise Clause. However, in Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990), decided after Schad and since applied by several courts to zoning regulations, the Supreme Court found that depending on the nature of the challenged law or governmental action, a free exercise claim can prompt either strict scrutiny of rational basis review.[1] Thus, the standard set out in Schad is no longer controlling in all circumstances. The Supreme Court, in Smith, held that, generally, the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Smith, 494 U.S. at 879. The Third Circuit recently applied this principle in Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002), holding if a law is "neutral" and "generally

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[1] To survive strict scrutiny, a challenged government action must be narrowly tailored to advance a compelling government interest, whereas rational basis review requires merely that the action be rationally related to a legitimate government objective. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990).

applicable," and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection. However, if the law is not generally applicable (if it discriminates against religiously motivated conduct) or is not generally applicable (if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on the religious conduct violates the Free Exercise Clause unless the law is narrowly tailored to advance a compelling government interest. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d at 165 (citing Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

"A law us not neutral if the object of the law, whether overt or hidden, is to infringe upon or restrict practices because of their religious motivation." Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) (citing Lukumi Bablu, 508 U.S. 520). The requirement that the law be of general applicability protects against unequal treatment which results "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." Lukumi Bablu, 508 U.S. at 542-43. Several cases applying the principles espoused in Smith, 494 U.S. 872, have held that zoning regulations that incidentally affect religious exercise are neutral laws of general applicability. In Mount Elliot, 171 F.3d at 405, the Sixth Circuit held that an ordinance prohibiting a cemetery in certain zone was neutral law of general applicability which did not infringe on the plaintiff church's right to free exercise of religion. Similarly, in Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), the Second Circuit has held that the defendant City of New York did not violate the plaintiff church's free exercise rights by

upholding a Landmarks Law which prevented the plaintiff from constructing a new office building in place of its community house to provide space and generate revenue as support for its ministerial and community activities. In Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991), a case with circumstances most analogous to our case, the Eight Circuit held that an ordinance which prohibited churches from commercial and industrial zone was a law of general applicability absent evidence that it was enacted to regulate religious worship.

Here, Long Branch enacted Ordinance 20-6.13 with the goal of rejuvenating the Long Branch commercial district and in doing so limited property uses in the C-1 area to commercial enterprises. All property owners, not just religious organizations, must apply for a variance to use property within the C-1 Commercial District for purposes not specifically authorized by the Ordinance. Moreover, religious organizations are allowed to use property in many other zones in Long Branch without a variance. Plaintiffs have not alleged not submitted evidence that Long Branch enacted the Ordinance with the intent or purpose to inhibit the exercise of religion or suppress religious beliefs. Accordingly, the Court finds that Long Branch Ordinance 20-6.13 is a neutral law of general applicability. However, the Court's analysis of Plaintiffs' free exercise claim continues.

In Smith, 494 U.S. at 881-82, the Supreme Court also retained the "strict scrutiny" test for instances where the regulatory law impacts the Free Exercise Clause in conjunction with another constitutional protection. The Court observed "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action

have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional rights, such as freedom of speech and of press, or the rights of parents . . . to direct the education of their children." Smith, 494 U.S. at 881-82. For such hybrid claims, states must establish that the regulation being challenged is narrowly tailored to serve a compelling governmental interest. Id. Plaintiffs argue that Long Branch Ordinance 20-6.13 must be analyzed under the strict scrutiny standard even if the Ordinance is neutral and generally applicable because Plaintiffs also allege the Ordinance violates Plaintiffs' rights to free speech and freedom of association under the First Amendment, to equal protection under the Fourteenth Amendment, and under the RLUIPA.

In Cornerstone Bible Church, 948 F.2d 464, the Eighth Circuit found that the plaintiff's Free Exercise Clause claim could not be resolved until the district court determined whether the plaintiff's other allegations of constitutional violations were meritorious. The court found that standing alone, the plaintiff's claim under the Free Exercise Clause could be properly dismissed because the regulation at issue was a neutral one of general applicability. However, if the plaintiff's other constitutional claims survived, the district court would have to consider the Free Exercise Clause claim under the strict scrutiny standard. Cornerstone Bible Church, 948 F.2d at 472-73. Likewise, this court must first determine whether Plaintiffs' other constitutional claims are meritorious before deciding whether Plaintiffs are entitled to summary judgment on their free exercise claim. See infra Parts II. B-E.

B. Long Branch Ordinance 20-6.13 and Plaintiffs' First Amendment Rights to Free Speech and Assembly

The First Amendment's Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. "Speech" is not construed literally, or even limited to the use of words. Constitutional protection is afforded not only to speaking and writing, but also to some nonverbal acts of communication, often referred to by some courts as "expressive conduct" or "symbolic speech." Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 158 (3d Cir. 2002). Conduct is protected by the First Amendment when "the nature of [the] activity, combined with the factual context and environment in which it was undertaken," shows that the "activity was sufficiently imbued with elements of communication to fall within the [First Amendment's] scope." Id. (citing Spence v. Washington, 418 U.S. 405, 409-10 (1974); Troster v. Pa. State Dep't of Corrections, 65 F. 3d 1086, 1090 (3d 1995)). Context is crucial to evaluating an expressive conduct claim because "the context may give meaning to the symbol" or act in question. Id. (citing Spence, 418 U.S. at 410).

The Third Circuit has unequivocally held that the act of constructing houses of worship does not implicate the Free Speech Clause; rather, courts consistently analyze the constitutionality of zoning regulations limiting such construction under the Free Exercise Clause. Tenafly Eruv Ass'n, 309 F.3d at 163 (citing City of Boerne v. Flores, 521 U.S. 507, 534 (1997); Congregation Kol Ami v. Abington Township, 309 F.3d 120 (3d Cir. 2002); Messiah Baptist

Church v. County of Jefferson, 859 F.2d 820, 823-26 (10th Cir. 1988); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307-08 (6th Cir. 1983); Church of Jesus Christ of the Latter-Day Saints v. Jefferson County, 741 F. Supp. 1522, 1527-34 (N.D. Ala. 1990). Plaintiffs are not entitled to summary judgment on claims that their rights to free speech under the First Amendment were violated by the Ordinance's provision that a church building is not a permitted land use in the C-1 Commercial District. The Third Circuit has noted that:

> if solely the act of erecting a wall separating the interior of a building from the secular world constituted "speech," every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could raise a "hybrid" rights claim triggering strict scrutiny,..., a nation so astonishing that we are unaware of any court – or even any law review article – that has suggested it.

Tenafly Eruv Ass'n, 309 F.3d at 163 (citing Smith, 494 U.S. at 881-82).

However, Plaintiffs argue that prayer is religious speech, and the Ordinance restricts that speech in violation of their First Amendment rights. Plaintiffs further argue that by permitting secular assembly but no religious assembly in the C-1 Commercial District, Long Branch Ordinance 20-6.13 impermissibly provides Long Branch with the power to curtail Plaintiff's Free Speech rights in the C-1 zone.

Similarly, in Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago, 157 F. Supp. 2d 903, 915

(N.D. Ill. 2001), the plaintiffs based free speech and assembly claims on the presumptions that the zoning ordinance at issue implicated the First Amendment by limiting the location of churches in the city. The plaintiffs in C.L.U.B., like the plaintiffs in the case at bar, argued that they were entitled to heightened scrutiny because they engaged in religious speech and assembly. However, the Northern District of Illinois held that the "operation of a house of worship does not equate with 'religious speech,' any more than the operation of shoe store equates with commercial speech." Id. (citing There to Care, Inc. v. Comm'r of Indiana Dep't of Revenue, 19 F.3d 1165 (7th Cir. 1994)). Rather, the Court held, the operation of business, including a charitable business, is subject to zoning laws, even if the business makes its money by engaging in conduct within the core of the First Amendment. C.L.U.B., 157 F. Supp. 2d at 915 (citing There to Care, 19 F.3d at 1167). The court held that the First Amendment protections as to speech and assembly are not so all-encompassing as to include activity in which an idea, goal or value is promoted. Zoning restrictions that have an incidental effect on the ability of people to congregate as they desire are subject to rational basis scrutiny. C.L.U.B., 157 F. Supp. 2d at 915 (citing Village of Belle Torre v. Boraas, 416 U.S. 1 (1974)). The C.L.U.B. court found, under the rational basis analysis, that "[w]hen the object of the law is unrelated to expression, e.g. harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message." C.L.U.B., 157 F. Supp. 2d at 915-16. Accordingly, the court found the plaintiffs' First Amendment rights were not violated.

This Court agrees with the rationale of the Northern District of Illinois and the Seventh Circuit. Long Branch

Ordinance 20-6.13 only incidentally affect Plaintiffs' rights to free speech and assembly, and the constitutionality of the Ordinance with regard to those rights should be examined under the rational basis standard. Defendant Long Branch enacted the Ordinance with the goal of developing the C-1 zone as a commercial district. All property owners who seek to use land within the C-1 zone for purposes other than that specified in the Ordinance must seek a variance, not just Plaintiffs or others who seek to use property for religious purposes. Under the rational basis standard, the Court finds the Plaintiffs' motion for summary judgment on their claim that the Ordinance violates their rights to free speech and assembly must be denied.

Alternatively, some courts have evaluated zoning ordinances that allegedly impinge on free speech rights as time, place and manner restrictions. In Cornerstone Bible Church, 948 F.2d 464, the Eighth Circuit evaluated the constitutionality of a zoning ordinance that excluded churches from the defendant city's central business district. The city's stated objective was to allow uses that generate economic activity. When, as in Cornerstone Bible Church, the justification for a regulation of free speech is content-neutral, the Supreme Court considers the regulation of time, place and manner restriction which must (1) be narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels for communication of information. Cornerstone Bible Church, 948 F.2d at 469 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)). The Cornerstone Bible Church court held that zoning in general is a legitimate municipal tool and found that the defendant city's revitalization plan was unquestionably a permissible municipal objective. However, the court held that whether the ordinance was narrowly tailored required a more particularized scrutiny.

Although the city was not required to show that its ordinance was the least restrictive means to accomplish its objective, the court held that the city could not regulate expression in such a manner that substantial portion of the burden on speech does not serve to advance its goals. Cornerstone Bible Church, 948 F.2d at 469. There, the court found that genuine issues of material fact existed as to whether restricting churches from the commercial district advanced the city's stated goals, and therefore, denied the defendant city's motion for summary judgment.

Here, Defendant Long Branch asserts that purpose of the Ordinance is to develop the C-1 zone as a commercial district, a content-neutral regulation. Plaintiffs argue that the Ordinance allows for forms of assembly other than churches, and therefore, must be examined as content-based restriction. That the Ordinance allows for landowners to use property within the C-1 zone for bowling alleys and motion-picture theaters does not support Plaintiffs' argument because such uses are clearly commercial. The Ordinance allows for "assembly halls." This Court cannot determine, without further evidence, whether permitted use as an assembly hall is limited to commercial enterprises. However, such a determination is not now necessary for the Court's analysis. Rather, the Cornerstone Bible Church court made clear that if the stated reason for prohibiting churches is content-neutral, the time, place and manner restriction must be applied.

Defendant asserts that churches not permitted in the C-1 zone because Long Branch is attempting to rejuvenate that area as a commercial district. It is undisputed that churches are allowed in other zones of Long Branch. Thus, the Court finds that the Long Branch zoning ordinances leave open ample alternative channels for communication of

Plaintiffs' information. Additionally, as stated, this court finds that zoning is a legitimate municipal tool. Thus, the only question before this Court is whether the Ordinance is sufficiently narrowly tailored to meet the Defendant's stated purpose. As in Cornerstone Bible Church, this Court finds that the parties have submitted insufficient evidence for the Court to make such a determination. Plaintiffs argue that the fact that other forms of assembly are permitted in the C-1 zone indicates that the Ordinance is not sufficiently narrowly tailored to avoid violating Plaintiffs' rights. However, Plaintiffs must prove that those other permitted forms of assembly are not all for commercial purposes to support a finding that the Ordinance is not narrowly tailored to meet Defendant's stated reasons for the regulation. Accordingly, even if the Court were to apply the time, place and manner analysis rather than the rational basis standard, Plaintiffs are not entitled to summary judgment at juncture.

C. Long Branch Ordinance 20-6.13 and Plaintiffs' First Amendment Rights to Freedom of Association

The right to freedom of association under the First Amendment is two-fold: (1) the right to engage in certain intimate human relationships free from undue intrusion by the state; and (2) the right to associate with others for purposes of undertaking "activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Part and parcel to the right to engage in the aforementioned First Amendment activities "is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Id. at 622.

Plaintiffs' argument based on their freedom of association rights is not clear because Plaintiffs merely outline the protections courts have given to freedom of association rights but do not apply the law to the present circumstances. Presumably, Plaintiffs are contending that Long Branch Ordinance 20-6.13 violates their freedom of association rights by restricting where they can locate their religious organization. However, the Third Circuit has made clear that the right of association does not provide protection in the context of zoning regulations. Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989) (citing Belle Terre, 416 U.S. 7). In Doe v. City of Butler, the zoning regulation limited the total number of residents allowed to occupy a transitional dwellings for battered women and their children. The Third Circuit found that such a limitation did not prevent the plaintiffs from associating with each other, and with others similarly situated, but rather, merely provided that for zoning purposes, a reasonable occupancy limit must be observed. While the Long Branch Ordinance limits the locations where Plaintiffs can associate, the Court finds that because Defendant provided numerous areas other than the C-1 zone where Plaintiffs can use property for church and other religious functions without seeking a variance, Long Branch's decision to limit the C-1 zone to commercial enterprises in an effort to rejuvenate the area does not impinge upon Plaintiffs' First Amendment rights to freedom of association. Accordingly, Plaintiffs' motion for summary judgment on such claim is denied.

D. Long Branch Ordinance 20-6.13 and Plaintiffs' Fourteenth Amendment Rights to Equal Protection

The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Const. amend. XIV. This clause is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The Supreme Court has established the appropriate standards for determining the validity of state legislation, such as zoning ordinances, under the Equal Protection Clause:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). If the legislative classification negatively affects such a suspect class, then courts may uphold the classification only if it is "precisely tailored to serve a compelling government interest." Pyler v. Doe, 457 U.S. 202, 216-17 (1982). Absent an invidious or gender-based classification, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440.

Plaintiffs allege that Long Branch Ordinance 20-6.13 violates their rights under the Equal Protection Clause because secular assembly in the C-1 zone is permitted but religious assembly is not. The Court first notes that Plaintiffs have submitted no evidence to support the

proposition that all forms of secular assembly are permitted by the statute. Thus, based on the factual record presently before this Court, Plaintiffs are not entitled to summary judgment even if they are considered a suspect class.

Moreover, several courts have held, and this Court concurs, that while individuals of a particular religious faith may constitute a suspect class requiring heightened scrutiny, churches or church organizations as entities do no generally qualify as a suspect class. In the context of zoning ordinances, the owners of churches are operators of the physical structure in which people gather to celebrate and are not a suspect class. See Cornerstone Bible Church, 948 F.2d at 471-72 (holding classification of churches for land use planning was not analogous to classification based upon the religious status of the faithful and zoning ordinance controlling the location of churches was properly evaluated under the rational basis test); Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (holding zoning ordinance excluding churches from certain districts was rational and survived equal protection challenge); KDM v. Reesport Sch. Dist., 196 F.3d 1046, 1051-52 (9th Cir. 1999) (holding parochial school students are not a suspect class). Accordingly, unless Plaintiffs can demonstrate that the Ordinance infringes upon a fundamental right, the restrictions on the C-1 are subject to a rational basis, not strict scrutiny, review.

To raise the equal protection analysis to heightened scrutiny under the fundamental rights theory, a challenged ordinance must produce "grave interference with important religious tenets" or "affirmatively compel [church members] to perform acts undeniably at odds with fundamental tenets of their religious beliefs." C.L.U.B.,

157 F. Supp. 2d at 911 (citing Griffin High Sch. V. Illinois High Sch. Assoc., 822 F.2d 671, 674 (7th Cir. 1987)). As the C.L.U.B. court found in the circumstance before it, the Ordinance at issue in the case at bar cannot be reasonably interpreted to regulate religious beliefs or compel individuals to perform any acts. Rather, Long Branch Ordinance 20-6.13 simply limits the location of church buildings, which is not the regulation of belief. The C.L.U.B. court observed that as here, the defendant city had responsibility to create and implement a land use plan for the city as a whole and supervising the location of churches in this regard is clearly distinguishable from regulating an individual's right to pray, worship or celebrate. C.L.U.B., 157 F. Supp. 2d at 911. Not only are Plaintiffs not a protected class under the Equal Protection Clause, but they cannot establish that the Ordinance infringes upon a fundamental right. Whether the Ordinance violates Plaintiffs' rights under the Equal Protection Clause should be analyzed under the rational basis standard.

Under the rational basis inquiry, Long Branch Ordinance 20-6.13 likely passes constitutional muster as to the Equal Protection Clause of the Fourteenth Amendment. The division of municipalities into various districts and the prohibition of certain uses from each district is a common and accepted practice. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Long Branch's zoning scheme must be viewed as a whole. It is undisputed that churches are permitted in other zones in Long Branch without a variance and that churches are no the only uses of land prohibited in the C-1 zone. Long Branch stated that is seeks to develop the C-1 zone as a commercial district and churches do not fit with such a scheme. Defendant can likely prove that the Ordinance is rationally related to a legitimate government interest. Accordingly, Plaintiffs'

motion for summary judgment on their claim that Long Branch Ordinance 20-6.13 violates their rights under the Equal Protection Clause is denied.

E. Long Branch Ordinance 20-6.13 and Plaintiffs' Rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq.

The RLUIPA provides in pertinent part:

§ 2000cc. Protection of land uses as religious exercise.

(a) Substantial burdens. (1) General rule.

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling government interest.

(2) Scope of application. This subsection applies in any case in which –

...

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion. (1) Equal terms.

> No government shall impose or implement a land use regulation in a manner than treats a religious assembly or institution on less than equal terms with nonreligious assembly or institution.
> (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
> (3) Exclusion and limits. No government shall impose or implement a land use regulation that –
>
> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(a)-(b).

Plaintiffs assert that Long Branch Ordinance 20-6.13 imposes a substantial burden on their exercise of religion and that Long Branch cannot demonstrate a compelling governmental interest in upholding the Ordinance and cannot prove that the total exclusion of religious assemblies from the C-1 zone is the least restrictive means. 42 U.S.C. § 2000cc(a). Plaintiffs further allege that by permitting assemblies other than churches in the C-1 zone, Long Branch Ordinance 20-6.13 violates the RLUIPA because (1) the Ordinance treats a religious assembly such as the Mission on less than equal terms afforded nonreligious assemblies; (2) the Ordinance discriminates against the Mission, a religious based assembly; and (3) the Ordinance totally excludes religious assemblies from the C-1 Zone, or at least, unreasonably limits religious assemblies, institutions, or structures within the City of Long Branch. 42 U.S.C. § 2000cc(b).

1. Plaintiffs' Claims Pursuant to 42 U.S.C. § 2000cc(a)

There is a dearth of case law discussing the RLUIPA. However, a plain reading of the statute makes clear that to establish a prima facie case that Section 2000cc(a) of the RLUIPA has been violated, a plaintiff must present evidence that the land use regulation in question: (1) imposes a substantial burden; (2) on the "religious exercise;" (3) of a person, institution, or assembly. 42 U.S.C. § 2000cc(a)(1); Murphy v. Zoning Comm'n of the Town of New Milford, 148 F. Supp. 2d 173, 187 (D. Conn. 2001). If the plaintiff makes this prima facie showing, the burden shifts to the local government to demonstrate that the land use regulation furthers a compelling government interest and that the land use regulation is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000cc(a)(1)(A)-(B).

The RLUIPA does not define what constitutes a "substantial burden" on the exercise of religion; however, the Act's legislative history evidences Congress' intent that courts apply the same "substantial burden" test applied under the Religious Freedom Restoration Act ("RFRA"), the RLUIPA's predecessor, which the Supreme Court found to be unconstitutional in City of Boerne v. Flores, 521 U.S. 507 (1997). 146 Cong. Rec. E. 1563 (Sept. 22, 2000) (noting that the RLUIPA's "general rule" tracks the substantive language of the RFRA but limits its scope to land use laws). The substantial burden must be on a "sincerely held" religious belief. Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972). For a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. Lyng v. Northwest Indian Cemetery

Protective Ass'n, 485 U.S. 439, 450-51 (1988); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981). Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion. Lyng, 485 U.S. at 450-51. For a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1194 (discussing the definition of substantial burden in an RLUIPA case) (citing Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1980); Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996)).

The few district court cases which have interpreted the RLUIPA delineate the difference between a "substantial burden" on religious exercise as opposed to an "inconvenience" on religious exercise. In Grace, 235 F. Supp. 2d at 1194, the District of Wyoming observed that, consistent with the Supreme Court's substantial burden test, district courts have concluded that land use regulations must have a "chilling effect" on the exercise of religion to substantially burden religious exercise. In Murphy, 148 F. Supp. 2d 173, the District of Connecticut held that a city's zoning regulation and the zoning commission's issuance of a cease and desist order to prohibit the plaintiffs from having a Sunday prayer group at their house imposed a substantial burden on the plaintiffs' exercise of religion. The Murphy court explained that the issuance of the cease and desist order, which dissuaded parishioners from attending the Sunday prayer group for fear of arrest, was a substantial burden of the plaintiffs' exercise of religion because:

> foregoing or modifying the practice of one's religion because of governmental interference or fear of punishment by the government is precisely the type of "substantial burden" Congress intended to trigger the RLUIPA's protections . . . .

Murphy, 148 F. Supp. 2d at 187.

In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002), the Center District of California held that the denial of the plaintiff's application to build a church on the plaintiff's property constituted a substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion." This Court notes that the plaintiff in Cottonwood was the owner of an 18 acre parcel of land on which it sought to build a church facility that would include a 4,700 seat auditorium and surrounding buildings for use of its ministries. The plaintiff spent several years acquiring the land and developing detailed plans for the facility. When denying the plaintiff's application to continue with its plan, the defendant did not offer other areas where the plaintiff's facility would be allowed and did not indicate that there was any other property in the city that could even accommodate the plaintiff's plans.

Federal courts have been reluctant to find a substantial burden on religion where the land use regulation merely creates an inconvenience, economic or otherwise, on the institution or adherent. In Henderson v. Kennedy, 265 F.3d 1072, 1074 (D.C. Cir. 2001), the District of Columbia Circuit held that a park service regulation which prohibited the plaintiffs from selling t-shirts on the National Mall was not a substantial burden on the plaintiffs' religious exercise

because the ban on t-shirt sales was, as most, only a restriction on one of many means by which the plaintiffs could engage in their vocation to spread the gospel. The Henderson court explained that the plaintiffs could operate their business in other areas of the town consistent with the land use regulations; therefore, the regulation was not a substantial burden on their vocation. Henderson, 265 F.3d at 1074. Similarly, in San Jose Christian College v. City of Morgan Hill, CIV.A. No.01-20857, 2002 WL 971779, at *2 (N.D. Cal. Mar. 5, 2002), the Northern District of California held that a religious institution that was denied a zoning application to use its property as a Christian college campus could not demonstrate a substantial burden on its religion because having the college in that particular area of the city was not a religious experience mandated by the plaintiff's faith.

In a pre-RFRA and RLUIPA case, the Second Circuit held that a religious institution had failed to demonstrate a substantial burden on its religious activities when it was denied a variance to expand its church building for purely commercial reasons to generate revenues for the church. Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357 (2d Cir. 1990). The Second Circuit upheld the district court's finding that the religious institution could carry out its religious mission in its existing facilities. Id. In C.L.U.B. v. City of Chicago, CIV.A. No.94-cv-6151, 2002 WL 485380, at *2 (N.D. Ill. Mar. 29, 2002), the court held that a zoning ordinance which excluded churches and from the light manufacturing districts did not violate the RLUIPA. Churches were allowed in other areas of the defendant city and were treated no differently under the zoning scheme than other similar, non-religious forms of assembly. C.L.U.B., 2002 WL 485380, at *2.

So, to satisfy its prima facie case, Plaintiffs must establish that Long Branch Ordinance 20-6.13 has more than an incidental effect on their religious exercise; indeed, that the Ordinance has a tendency to coerce Plaintiffs into acting contrary to their religious beliefs. Furthermore, the substantial burden must be on a "sincere" exercise of religion, that is, the belief underlying the exercise must be truly held and religious in nature. See Grace, 235 F. Supp. 2d at 1195 (citing Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001); Marria v. Broaddus, 200 F. Supp. 2d 280, 292 (S.D.N.Y. 2002)). Whether religious beliefs are sincerely held is a question of fact. Grace, 242 F. Supp. 2d at 1195 (citing Mosier v. Maynard, 937 F.2d 1521, 1526 (10th Cir. 1991)).

The second requirement that a plaintiff must demonstrate to state a claim under Section 2000cc(a) of the RLUIPA is that the land use regulation substantially burdens the person or institution's "religious exercise." 42 U.S.C. § 2000cc(a)(1). Religious activity is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). It is important to note for the circumstances of the case at bar that the "use, building, or conversion of real property for the purpose of religious exercise" is considered to be in itself a "religious exercise." 42 U.S.C. § 2000cc-5(7)(B).

If the plaintiff establishes a prima facie case under the RLUIPA, the burden shifts to the local government to prove its land use regulation furthers a compelling governmental interest by the least restrict means available. Thus, the RLUIPA imposes a strict scrutiny standard of

review on land use laws that substantially burden religious exercise.

It is clear that Plaintiffs' intended use of 162 Broadway, as a church and mission, constitutes religious exercise under the RLUIPA. 42 U.S.C. § 2000cc-5(7)(B). Nor do Defendants contest that Plaintiffs' religious beliefs are sincerely held. However, based on the evidence submitted this far, the Court finds there are genuine issues of material fact as to whether the Ordinance imposes a substantial burden on Plaintiffs' exercise of religion, and if so, whether it and its regulations further a compelling governmental interest and are the least restrictive means of doing so. Plaintiffs are not entitled to summary judgment at this juncture.

Whether the land use regulation imposed by Long Branch Ordinance 20-6.13 constitutes an incidental effect that makes it more difficult for Plaintiffs to act contrary to their religious beliefs must be further explored. Neither party adequately briefed the issue, nor submitted sufficient evidence in support of either position. The Court notes that Defendant Long Branch has not prohibited churches from all areas of the city, but rather, only from commercial zones. As in Henderson, 265 F.3d 1072, Plaintiffs do have an opportunity to express their religious beliefs in other areas of the city. In Grace, 235 F. Supp. 2d at 1197, the District of Wyoming denied cross-motions for summary judgment when there was a genuine issue of material fact as to, inter alia, whether the defendant city's land use regulations substantially burdened the plaintiff's exercise of religion. The zoning ordinance required the plaintiff church to operate its child care center in an area of the city zoned for that type of operation. The court found that such an ordinance did not have a chilling effect on the church's

exercise of religion, like being placed in fear of arrest for the exercise of religion, see Murphy, 148 F. Supp. 2d 173, or not being able to build a church at all. See Cottonwood, 218 F. Supp. 2d 1203. Rather, the court held, it was more akin to the Henderson case because the plaintiff church could operate its day care facility in other areas consistent with the city's land regulations. Thus, the court found that the defendant city did not put substantial pressure on the plaintiff church to modify its behavior or violate its religious beliefs, but only required the church to operate its day care facility in an area of the city zoned for such an operation. Grace, 235 F. Supp. 2d at 1197.

Similarly, Plaintiffs can operate their church and mission in other areas of Long Branch without seeking a variance. This weighs in favor of finding that the Ordinance is an inconvenience to Plaintiffs' exercise of religion rather than a substantial burden on such exercise. This case is distinct from Cottonwood, 218 F. Supp. 2d 1203, which determined that the defendant city's land use decisions preventing the plaintiff from building a church facility on its property was a substantial burden on the plaintiff's religious exercise. As said earlier, the plaintiff in Cottonwood sought to build a church facility that would include a 4,700 seat auditorium and surrounding buildings for its ministries after spending years acquiring 18 acres of land developing detailed plans for the proposed use. The court did not consider whether there were alternative locations for the facility, but addressed the plaintiff's claims as if the location at issue, on which the defendant city prohibited the plaintiff from building, was the plaintiff's only option. Such circumstances differ from those before this Court and clearly affect whether a zoning ordinance should be considered an inconvenience or a substantial burden. The Cottonwood zoning ordinance

would coerce the plaintiff into acting contrary to its religious beliefs because a 4,700 member congregation would be unable to worship and carry out the Cottonwood Christian Center's ministries. To require Plaintiffs to establish their church and mission in a location other than the C-1 Commercial District does not coerce them into acting contrary to their religious beliefs, but rather, only requires them to exercise those beliefs in another area of Long Branch.

If simply creating and enforcing a zoning scheme that divides residential and commercial areas and demarcates where such institutions as churches and schools can be located violates the RLUIPA, all zoning ordinances would be prohibited. Zoning ordinances have traditionally been held by the Supreme Court and district courts to be valid and constitutional. The RLUIPA cannot be interpreted so broadly as to override such holdings.

The Long Branch zoning scheme includes a process for Plaintiffs to appeal the initial denial of their land use proposal and to seek a variance from the restriction imposed by the Long Branch Ordinance 20.6-13. If the Zoning Board were to rule in Plaintiffs' favor on appeal or Plaintiffs were granted a variance, it does not seem that either process, or even both, would constitute a substantial burden on their religious exercise, but rather only an inconvenience. Accordingly, it is unlikely that upon the submission of further evidence, Plaintiffs will be able to establish that the Ordinance, it and of itself, violates their rights under the RLUIPA. The Court will, however, upon the denial of Plaintiffs' motion for summary judgment as to their claim under 42 U.S.C. § 2000cc(a)(1), allow for the submission of further, if any, evidence to determine whether the Ordinance imposes a substantial burden on

Plaintiffs, and if so, whether Defendant Long Branch can demonstrate that it has a compelling interest in upholding its zoning regulations and the Ordinance is the least restricted means of meeting that interest.

2. Plaintiffs' Claims Pursuant to 42 U.S.C. § 2000cc(b)

Plaintiffs also assert claims under Section 2000cc(b) of the RLUIPA which prohibits discrimination and exclusion against a religious assembly or institution by directing that no government shall impose or implement a land use regulation in a manner that: (1) treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution; (2) discriminates against any assembly or institution on the basis of religion or religious denomination; or (3) totally excludes religious assemblies from a jurisdiction, or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. 42 U.S.C. § 2000cc(b).

The Court has found only one district court case that addresses this provision of the RLUIPA. In C.L.U.B., 2002 WL 485380, the association Civil Liberties for Urban Believers and some of its member churches filed suit against the City of Chicago claiming that the city's zoning policy and procedures violated, inter alia, Section 2(b)(1) of the RLUIPA which prohibits local governments from treating religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions. The zoning scheme at issue excluded churches and municipal and privately owned recreation buildings and community centers from the light manufacturing districts in the city. The Northern District of Illinois held that such a

scheme did not violate 42 U.S.C. § 2000cc(b)(1) because the "zoning scheme must be viewed as a whole, with attention focused as to how the pieces combine to form the complete zoning scheme," and as such, the scheme "treats [the plaintiffs] as well, if not better than similar, nonreligious assembly uses." C.L.U.B., 2002 WL 485380, at *2.

Under the circumstances of this case, the Court finds that the Long Branch zoning scheme does not violate Plaintiffs' rights under 42 U.S.C. § 2000cc(b)(3), which prohibits land use regulations that totally exclude religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. 42 U.S.C. § 2000cc(b)(3). While Long Branch Ordinance 20-6.13 totally excludes religious assemblies from the C-1 zone, the "jurisdiction" to which 42 U.S.C. § 2000cc(b)(3) refers includes all of Long Branch. As the Northern District of Illinois held in C.L.U.B., 2002 WL 485380, the zoning scheme must be viewed as whole. It is undisputed that churches and other religious assemblies are permitted uses in other areas of Long Branch and that Plaintiffs could establish their church and mission in those areas without even having to apply for a variance. Accordingly, Plaintiffs' motion for summary judgment as to their claims pursuant to 42 U.S.C. § 2000cc(b)(3) must be denied.

Regarding Plaintiffs' claims pursuant to 42 U.S.C. § 2000cc(b)(1)-(2), the Court finds that without further evidence as to the specific types of assemblies Long Branch has permitted in the C-1 zone, the Court cannot determine whether the Long Branch zoning scheme treats Plaintiffs' religious assembly or institution on less than equal terms with a nonreligious assembly or institution, 42

U.S.C. § 2000cc(b)(1), or in a discriminatory manner on the basis of religion. 42 U.S.C. § 2000cc(b)(2). Long Branch Ordinance 20-6.13 specifically permits assembly halls, bowling alleys, and movie theaters. The C-1 zone is a Commercial District. Bowling alleys and movie theaters are inherently commercial enterprises, and not comparable to Plaintiffs' requested use of the property for determining whether Long Branch treats religious assemblies as less than equal to nonreligious assemblies or in a discriminatory way based on religion. If the byproduct of a commercial enterprise is assembly and such an enterprise is allowed in a commercial district, this cannot serve as a comparison for determining whether a religious assembly is treated unfairly by a zoning scheme that limits certain areas to commercial businesses. However, the Court notes that if the "assembly halls" permitted by the Ordinance in the C-1 zone include such non-commercial assemblies as, for instance, the Boy Scouts, or various social clubs such as the Elks or Knights of Columbus, the permission of such other non-commercial uses may serve as a basis for determining that the Long Branch zoning scheme treats religious assemblies or institutions, or at least Plaintiffs' organization unequally or in a discriminatory manner in violation of 42 U.S.C. § 2000cc(b)(1) and (2). However, without further evidence as to the type of assemblies Long Branch allows in the C-1 zone, the Court cannot make such a determination and Plaintiffs' motion for summary judgment on their claims pursuant to 42 U.S.C. § 2000cc(b)(1) and (2) must be denied.

III. Plaintiffs' Motion for a Preliminary Injunction and Defendant BCIC's Motion for Summary Judgment

In addition to their motion for summary judgment, Plaintiffs have moved for a preliminary injunction pursuant

to Fed. R. Civ. P. 65 seeking injunctive relief: (1) compelling Long Branch to issue Plaintiffs a permit to use the property at 162 Broadway as a church; (2) compelling Long Branch to issue Plaintiff Reverend Brown a residential use permit allowing him to reside at 162 Broadway; (3) declaring Long Branch Ordinance 20-6.13 unconstitutional; (4) enjoining Long Branch from perpetrating any further constitutional violations of Plaintiffs' rights; and (5) staying BCIC's foreclosure action until resolution of the matter.

A preliminary injunction is an "extraordinary remedy, which should be granted in only limited circumstances." Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). When ruling on an application for a preliminary injunction, a court must consider the following four factors: (1) likelihood that the applicant will prevail on the merits at the final hearing; (2) the extent to which the applicant is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. Jiffy Lube International, Inc. v. Weiss Brothers, Inc., 834 F. Supp. 683, 688 (D.N.J. 1993) (citing S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992)). All four factors should favor preliminary relief before the injunction will issue. S & R Corp., 968 F.2d at 374 (citing Opticians Ass'n of America v. Independent Opticians of America. 920 F.2d 187, 192 (3d Cir. 1990)).

As provided in this opinion and the accompanying opinion on Defendant Long Branch's motion for summary judgment, most of Plaintiffs' claims against Defendant Long Branch are disposed of as a matter of law. Indeed, the sole remaining claim against Long Branch following these

opinions of Plaintiffs' claim that Long Branch Ordinance 20-6.13 is inherently unconstitutional. This issue is whether this surviving claim provides grounds for preliminarily enjoining defendant Long Branch as sought by Plaintiffs.

The Court finds that Plaintiffs are not entitled to a preliminary injunction against defendant Long Branch. For the reasons discussed, Plaintiffs do not demonstrate a likelihood of success on the merits on their remaining claim that Long Branch Ordinance 20-6.13 is inherently unconstitutional. As observed, Plaintiffs will not likely be able to prove, even after further factual development, that the Ordinance inherently violates their rights under the RLUIPA, First Amendment rights, or Fourteenth Amendment equal protection rights. Plaintiffs cannot make the threshold showing required for a preliminary injunction, and such relief must therefore be denied.

Plaintiffs also seek an injunction by way of stay restraining BCIC from prosecuting the foreclosure action instituted by BCIC against Plaintiffs in Monmouth County Court, Chancery Division. The foreclosure action is based on the tax sale certificate pertaining to 162 Broadway, which BCIC purchased on October 24, 1997.

The Amended Complaint seeks only injunctive relief against BCIC; there is no claim for money damages. In other words, the only relief sought against BCIC is an injunction preventing BCIC from prosecuting the foreclosure action pending final resolution of the litigation against the other defendants. In opposing Plaintiffs' motion for a preliminary injunction, BCIC has also moved for summary judgment. The inquiry on Plaintiffs' preliminary injunction motion and BCIC's summary judgment motion is therefore the same: whether Plaintiffs have made a

showing that they are entitled to injunctive relief. The Court will consider the motions together.

Plaintiffs do not, and apparently cannot, challenge the validity or priority of BCIC's tax lien. The question is whether Plaintiffs are entitled to enjoin BCIC based on their claims against other defendants. As determined, Plaintiffs cannot show they are likely to succeed on the merit on their claims against Defendants Abrams Gatta & Falvo, P.C. and Peter S. Falvo, Esq. provide a basis for injunctive relief against BCIC.

Plaintiffs argue that malpractice claim against the attorney defendants provides a basis for enjoining BCIC. First, they argue that federal courts have the authority to grant the full panoply of equitable remedies so a plaintiff can obtain complete relief. S.E.C. v. Antar, 831 F. Supp. 380 (D.N.J. 1993). From that proposition, Plaintiffs note that under New Jersey law, the remedy for legal malpractice is for the plaintiff to be placed in as good a position as he or she would have been but for the breach of duty. Saffer v. Willoughby, 143 N.J. 256, 271, 670 A.2d 527 (1996). According to Plaintiffs, the best way for them to be put in such a position, should they prevail on their legal malpractice claims, is for the defendant attorneys to assume liability for satisfaction of the delinquent taxes which led to the foreclosure action but which, according to Plaintiffs, never would have accrued but for the breach of care. That assignment of the tax liability, Plaintiffs claim, would satisfy the lien and prevent BCIC's foreclosure on the property. Because such relief would cease to be meaningful if BCIC were to complete foreclosure proceedings, Plaintiffs submit that such proceedings should be enjoined.

This Court, however, is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283, from staying proceedings in Monmouth County Court based on a claim for legal malpractice. The Anti-Injunction Act imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, unless the injunction falls within one of three specifically defined exceptions. Mitchum v. Foster, 407 U.S. 225, 228-29 (1972). The exceptions allow issuance of an injunction only where expressly authorized by act of Congress, where necessary in the aid of the federal court's jurisdiction, or to protect of effectuate the federal court's judgments. 28 U.S.C. § 2283. None of these exceptions applies to Plaintiffs' legal malpractice claim, which arises under state law. Plaintiffs argument that their case falls into one of the exceptions because it arises under § 1983, which expressly authorizes injunctions of state court proceedings, is mooted by the Court's earlier findings.

Plaintiffs' motion for a preliminary injunction is denied against defendant BCIC, and BCIC's motion for summary judgment is granted.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment on their claim that Long Branch Ordinance 20-6.13 is inherently unconstitutional in violation of their First Amendment rights to Free Exercise of religion[2], Free Speech and Assembly, and Freedom of

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[2] Because Plaintiffs could not establish a violation of any other of their fundamental rights, the hybrid analysis espoused by the Supreme Court in Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990),

Association, Fourteenth Amendment rights to Equal Protection, and rights under the RLUIPA is DENIED. Plaintiffs' motion for a preliminary injunction against defendants Long Branch and BCIC is DENIED, and defendant BCIC's motion for summary judgment is GRANTED.

/s/ William H. Walls, U.S.D.J.
4 April 2003

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requiring strict scrutiny of Plaintiffs' Free Exercise Clause claim, does not apply at this juncture. Accordingly, this Court's analysis of Plaintiffs' Free Exercise Clause claim, see supra Part II.A, is complete.

Filed April 7, 2004

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN Plaintiffs, v. THE CITY OF LONG BRANCH, BCIC FUNDING CORP., BREEN CAPITAL SERVICES, INC., ABRAMS GATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LAVERGNE, ESQ., and JOHN DOES A-Z Defendants.	:

OPINION
Civil Action NO. 00-3366

Walls, District Judge

All parties having moved for summary judgment and Plaintiffs The Lighthouse Institute for Evangelism, Inc. and

Reverend Kevin Brown (collectively "Plaintiffs") having moved for a preliminary injunction against defendants the City of Long Branch ("Long Branch") and BCIC Funding Corp. and Breen Capital Services, Inc. (collectively "BCIC"), and the Court having considered the submissions of the parties, it is on this 7th day of April 2003, hereby ORDERED that:

(1) Plaintiffs' motion for summary judgment on Count III of the Amended Complaint is DENIED;

(2) Plaintiffs' motion for preliminary injunctions against Long Branch and BCIC is DENIED;

(3) Long Branch's motion for summary judgment on Count I of the Amended Complaint is GRANTED;

(4) Counts II-IX and XIII of the Amended Complaint alleging injury based on Long Branch's application of Long Branch zoning ordinances to Plaintiffs' property are DISMISSED WITHOUT PREJUDICE

(5) Long Branch's motion for summary judgment on the punitive damages claims in Counts II-IX and XIII is GRANTED;

(6) Long Branch's motion for summary judgment on the compensatory damages claim in Count I is DENIED as moot;

(7) Long Branch's motion for summary judgment on those portions of Counts II-IX and XIII alleging injury caused by Long Branch zoning ordinances in and of themselves, rather than as applied, is DENIED;

(8) BCIC's motion for summary judgment is GRANTED; and

(9) Motion for summary judgment of defendants Abrams Gatta & Falvo, P.C. and Peter S. Falvo, Esq. is DENIED.

/s/ William H. Walls, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2343

THE LIGHTHOUSE INSTITUTE
FOR EVANGELISM INC.,
d/b/a THE LIGHTHOUSE MISSION;
KEVIN BROWN, REVEREND,
Appellants,

UNITED STATES OF AMERICA,
Intervenor-Plaintiff in D.C.,

v.

THE CITY OF LONG BRANCH; BCIC FUNDING
CORP; BREEN CAPITAL SERVICES, INC.;
ABRAMS GRATTA & FALVO, P.C.; PETER S. FALVO,
ESQ.; EUGENE M. LAVERGNE, ESQ.;
JOHN DOES A-Z.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER,
NYGAARD, ALITO, ROTH, McKEE, RENDELL,
BARRY, AMBRO, FUENTES, SMITH, CHERTOFF,
FISHER, VAN ANTWERPEN, and GIBSON, Circuit
Judges*

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* The vote of the Honorable John R. Gibson, Senior

The petition for rehearing being filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: July 26, 2004

SLC/CH/cc: Roman P. Storzer
Michael S. Kasanoff, Esq.
Howard B. Mankoff, Esq.
Audrey J. Copeland, Esq.
Betsy Ann Rosenbloom, Esq.

United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit, who sat by designation, is limited to panel rehearing.